

Nuclear Regulatory Commission

§ 2.348

the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further proceedings;

(i) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Judge, as appropriate requests for hearing not falling under § 2.104, where the requestor is entitled to further proceedings; and

(j) Take action on minor procedural matters.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49152, Aug. 28, 2007]

§ 2.347 *Ex parte* communications.

In any proceeding under this subpart—

(a)(1) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any *ex parte* communication relevant to the merits of the proceeding.

(2) For purposes of this section, *merits of the proceeding* includes:

(i) A disputed issue;

(ii) A matter which a presiding officer seeks to be referred to the Commission under 10 CFR 2.340(a); and

(iii) A matter for which the Commission has approved examination by the presiding officer under § 2.340(a).

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any *ex parte* communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it, and any responses to the communication, are promptly served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and

the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e) (1) The prohibitions of this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section cease to apply to *ex parte* communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.341, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to—

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(5) Communications, in contested proceedings and uncontested mandatory proceeding, regarding an undisputed issue.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49476, Aug. 28, 2007]

§ 2.348 *Separation of functions.*

(a) In any proceeding under this part, any NRC officer or employee engaged in the performance of any investigative or litigating function in the proceeding or in a factually related proceeding

with respect to a disputed issue in that proceeding, may not participate in or advise a Commission adjudicatory employee about the initial or final decision with respect to that disputed issue, except—

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on-the-record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to—

(1) Communications to or from any Commission adjudicatory employee regarding—

(i) The status of a proceeding;

(ii) Matters for which the communications are specifically permitted by statute or regulation;

(iii) NRC participation in matters pending before a court or another agency; or

(iv) Generic issues involving public health and safety or other statutory responsibilities of the NRC (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding—

(i) Initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) Supervision of NRC staff to ensure compliance with the general policies and procedures of the agency;

(iii) NRC staff priorities and schedules or the allocation of agency resources; or

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.

(3) None of the communications permitted by paragraph (b)(2) (i) through (iii) of this section is to be associated

by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it, and any responses to the communication, are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d)(1) The prohibitions in this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(iii) A matter which a presiding officer seeks to be referred to the Commission under 10 CFR 2.340(a); and

(iv) A matter for which the Commission has approved examination by the presiding officer under §2.340(a).

(2) The prohibitions of this section cease to apply to the disputed issues pertinent to a full or partial initial decision when the time has expired for Commission review of the decision in accordance with §2.341.

(3) Separation of functions does not apply to uncontested proceedings, or to an undisputed issue in contested initial licensing proceedings.

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by §2.347.

(f) If an initial or final decision is stated to rest in whole or in part on

fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion before the decision is filed, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49477, Aug. 28, 2007]

§ 2.390 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), (e), and (f) of this section, final NRC records and documents, including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, order, or standard design approval, or regarding a rule-making proceeding subject to this part shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room, except for matters that are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and

(ii) Are in fact properly classified under that Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), but only if that statute requires

that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types or matters to be withheld.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use